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IN THE

Supreme Court of the United States

October Term 1949

RICHARD I. EDWARDS and JAMES A. YOUNG, *Petitioners*

v.

CAPITAL AIRLINES, INC., *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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October 6, 1949.

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THE PARTIES

This is a cross petition for certiorari filed defensively in connection with the petition of Capital Airlines, Inc.,[1] in *Capital Airlines, Inc.*, v. *Edwards, et al.*, No. 229, this Term. To avoid confusion, cross petitioners will be referred to as the "plaintiffs" and the petitioner-respondent as "Capital".

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[1] Formerly Pennsylvania Central Airlines, Inc. In the record Capital is sometimes referred to as Pennsylvania Central Airlines and sometimes as PCA.

OPINIONS BELOW

The opinions below have not been reported. The District Court wrote an "informal memorandum" opinion (R. 40-41). The Court of Appeals handed down an opinion reversing the decision of the District Court (R. 192-200), and an opinion denying rehearing (R. 208-209).

JURISDICTION

The order denying rehearing was entered on May 10, 1949 (R. 210). On July 18, 1949, the Chief Justice extended the time to file a petition for certiorari until September 7, 1949. On August 15, 1949, he again extended it until October 7, 1949 (R. 213). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

STATUTES INVOLVED

Plaintiff Edwards, because he held a commission in the Naval Reserve, relies on the Army Reserve and Retired Personnel Law of 1940.[2] Plaintiff Young, because he was a volunteer, relies upon the service Extension Act of 1941,[3] which made applicable to volunteers the Selective Training and Service Act of 1940[4] (designed originally to cover only inductees). The rele-

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[2] Joint Resolution of August 27, 1940, c. 689 (54 Stat. 858-860), as amended by the Act of September 16, 1940, c. 720 (54 Stat. 891), 50 U. S. C. App., § 403. Though Edwards held a Navy commission he relies upon a statute entitled the *Army* Reserve and Retired Personnel Act; that Act specifically covers both the "land and naval" forces.

[3] Joint Resolution of August 18, 1941, c. 362 (55 Stat. 626-628), 50 U. S. C. App., § 357.

[4] Act of September 16, 1940, c. 720 (54 Stat. 885-897) as amended by the Act of December 8, 1944, c. 548 (58 Stat. 798), 50 U. S. C. App., § 308.

vant portions of the Army Reserve and Retired Personnel Law of 1940 are identical with those of the Selective Training and Service Act of 1940, and the only significance of the Service Extension Act of 1941 is to make applicable to a person in Young's position the provisions of the Selective Training and Service Act of 1940. As in the Courts below, we shall therefore refer only to the Selective Training and Service Act, the salient portions of which are set out in the Appendix.

QUESTIONS PRESENTED

1. Whether, contrary to the decision below, this case is controlled by *Fishgold* v. *Sullivan Corporation,* 328 U. S. 275.

2. Whether the plaintiffs, who left for military service immediately after they were laid off in reductions in force, were nevertheless entitled to reemployment without loss of seniority for time spent in military service under either the Selective Training and Service Act of 1940 or under a collectively bargained contract between Capital and the Air Line Pilots Association.

3. Whether plaintiff Young, who volunteered for military service and who thereafter was laid off in a reduction in force, lost all rights under the Selective Training and Service Act of 1940 and under the aforesaid contract as a result of such layoff.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia Circuit erred:

1. In refusing to follow the *Fishgold* case (*supra*).

2. In deciding that plaintiffs are not entitled to unbroken seniority from the date of their original employment under either the Selective Training and Ser-

vice Act or the contract between Capital and the Air Line Pilots Association (R. 29).

3. In holding that plaintiff Young's rights under the Selective Training and Service Act were cut off by a layoff which took place *after* he had made "all arrangements" to enter the Army (R. 92-93).

STATEMENT

Plaintiffs are pilots in the employ of Capital, and this suit involves their seniority as such pilots. Two periods of time are involved: (1) the period of their employment with Capital before the war; and (2) the period of the war when plaintiff Edwards served in the Navy and plaintiff Young with the Army Air Force. Plaintiffs claim seniority accrued during both periods. The Court below found them entitled to seniority accrued during the first period, before the war, and Capital's petition in No. 229 challenges its decision in this regard. The Court also found that plaintiffs were not entitled to accrue seniority while away at war, and the cross petition challenges this aspect of its decision.

Plaintiffs are concerned about their seniority because it determines whether they fly for Capital as captains (first pilots) or as co-pilots. A captain on an airline such as Capital is at the height of his profession, whereas a co-pilot in matters of both pay and prestige is little more than an apprentice (R. 8-9). As a result of the decision below, both plaintiffs have flown as captains since August when the Court of Appeals refused a further stay of its mandate. It is possible, however, that the seniority won below will prove insufficient to prevent their demotion to the rank of co-pilot during the winter months when airline schedules are curtailed. As a practical matter then, a reversal on the cross peti-

tion would make them year round captains; a denial of both petitions would leave them as Spring, Summer and Fall captains; and a reversal on Capital's petition (if not coupled with a reversal on the cross petition) would reduce them to co-pilots.

With the foregoing contingencies before them, plaintiffs decided not to file a petition for certiorari even though the decision below is squarely in conflict with *Fishgold* v. *Sullivan Corporation,* 328 U. S. 275. Their decision was made simply because they have been harassed by this case for three years and could ill afford further litigation. When Capital filed its petition, however, they were forced to file this cross petition in order to assure the Court's power to consider the entire case. *Langnes* v. *Green,* 282 U. S. 531. Under the circumstances, they do not wish a grant of the cross petition unless the petition is granted.

The facts of the case and its procedural course are stated in some detail in the brief in opposition to certiorari in No. 229, and no useful purpose would be served by repetition here.

REASONS FOR THE ISSUANCE OF THE WRIT

I

THE DECISION BELOW IS IN CONFLICT WITH *Fishgold* v. *Sullivan Corporation,* 328 U. S. 275.

The Court below found as a fact that plaintiffs were laid off in reductions in force in 1941 and 1942, respectively (R. 199-200, 209). It is conceded that they immediately entered military service, served honorably throughout the war, and returned to Capital under circumstances which fulfilled all the conditions of the Selective Training and Service Act (R. 85, 87, 93).

The only question is whether the layoffs severed the employer-employee relationship to such an extent that plaintiffs were not in the "employ" of Capital when they entered military service. This question arises out of the language of section 8 of the Act which covers only a:

> "person who, in order to perform such training and service, has left or leaves a position *in the employ* of any employer. . . ." (Italics ours).

Virtually the same question arises under section 21(f) of a collectively bargained contract between Capital and the Air Line Pilots Association which in effect incorporates the Selective Training and Service Act (R. 29).[5]

The Court below held that the layoffs severed the employer-employee relationship and that plaintiffs therefore were not "in the employ" of Capital when they entered military service. This decision is plainly in conflict with the *Fishgold* case unless the Court's distinction of the *Fishgold* case is valid. The Court said that Fishgold's layoff involved a "temporary cessation of work" whereas plaintiffs' layoffs were so "permanent" as to work a complete severance of the employment (R. 193-195).

The distinction is not valid. The plaintiffs' layoffs were "permanent" only because plaintiffs immediately went to war. As soon as they were available, they were

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[5] Section 21 (f) of the contract, as amended, provides that a "pilot" who goes to war shall "continue to accrue seniority" while in military service (R. 29). The question under this section is therefore whether plaintiffs were "pilots" when they entered military service, and this question in turn depends upon whether they were then *in the employ* of Capital.

rehired. Moreover, there is nothing whatever in the language of the Act which so much as suggests the Court's distinction, and as the *Fishgold* case holds (328 U. S. at p. 287) the Act was a carefully drafted piece of legislation which would have expressed such a distinction if one had been intended.[6] Furthermore, the decision below is an extremely narrow one which runs contrary to the admonition of the *Fishgold* case that the Act should be construed liberally in favor of those who went to war.[7]

It follows that the conflict with the *Fishgold* case is a square one.

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[6] The Court said in the *Fishgold* case that "* * * when Congress desired to cover the contingency of a layoff, it used apt words to describe it." 328 U. S. at p. 287. The Act covers any person "who, in order to perform such [military] service leaves a position, other than a temporary position, *in the employ* of any employer * * *." (italics ours) This language actually *does* "cover the contingency of a layoff"; for "in common parlance and industrial parlance" (328 U. S. at p. 286), a laid-off employee remains *in the employ* of his employer. *National Labor Relations Board* v. *Waterman*, 309 U. S. 206; *North Whittier Heights Citrus Association* v. *N. L. R. B.*, 109 F. 2d 76, 82 (C. C. A. 9th, 1940); *Marlin Rockwell Corp.* v. *N. L. R. B.*, 133 F. 2d 258 (C. C. A. 2d, 1943); *Reiber* v. *Rathbone*, 180 Wisc. 287, 193 N. W. 67 (1923); *Neid* v. *Tassie's Bakery*, 219 Minn. 272, 17 N. W. 2d 357 (1945).

[7] For example, the lower Court's construction would exclude from the benefits of the Act all persons inducted into service following common work stoppages caused by the war. Thus an employee inducted the day before such a work stoppage would be entitled to reemployment after the war. An employee inducted the day after, however, would have received a "permanent" or "complete" layoff, and according to the Court below he therefore would not be entitled to reemployment. The first employee having been hit *only* by the draft is covered by the Act but the second having been hit *both* by a war-induced work stoppage *and* by the draft is not. Congress obviously could not have intended any such distinction between the two employees.

II

THE DECISION BELOW AS TO YOUNG IS INCONSISTENT WITH *Rudisill* v. *Chesapeake & Ohio Ry. Co.*, 167 F. 2D 175 (C. C. A. 4TH 1948) AND *McCarthy* v. *M. & M. Transportation Company*, 160 F. 2D 322 (C. C A. 1ST, 1947).

It is undisputed that in the case of plaintiff Young "all arrangements had been made where I [he] could go into the Ferry Command" of the Army Air Force well before he received his notice of layoff (R. 91-93). It is also undisputed that *after* making such arrangements, Young told his immediate superior in Capital of his intention to enter the Army Air Force and requested his release for that purpose (R. 93). In the *Rudisill* case (*supra*), it was held that one who was immune from the draft (like Young, R. 125) and who nevertheless volunteers is entitled to the benefits of the Selective Training and Service Act. In the *McCarthy* case (*supra*) it was said that when a man is on his way into military service, an employer cannot cut off his rights under the Act by a discharge. It follows *a fortiori* from the *Rudisill* and *McCarthy* cases that once Young volunteered, his rights under the statute could not be cut off by a layoff, and the decision below that his rights were so cut off is in conflict with those two decisions.

CONCLUSION

As previously stated, plaintiffs do not wish an independent grant of the cross petition. If, however, the petition in No. 229 were to be granted, the cross petition should likewise be granted. A reversal of the decision below on the authority of the *Fishgold* case would provide a complete answer to all the contentions advanced by Capital in No. 229, and, although there are many

other answers to those contentions, the Court should make certain that it has the power to give that answer. *Langnes* v. *Green,* 282 U. S. 531. Moreover, the veterans' status of the plaintiffs as of the time of their postwar return to Capital has been inextricably involved in this dispute from the outset, and it would be most unjust and distorting to attempt review of this case with that status excluded from consideration.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted, but only if the petition in No. 229 is granted.

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APPENDIX

Selective Training and Service Act of 1940

(Act of September 16, 1940, c. 720 (54 Stat. 885-897), as amended by the Act of December 8, 1944, c. 548 (58 Stat. 798), 50 U. S. C. App., § 308).

Section 8.

(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. . . .

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been

on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. . . .